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IN THE

Supreme Court of the United States

October Term, 1965
No. 680

CHARLOTTE ANDREWS,

Petitioner and Appellant,

vs.

THE CITY OF SAN BERNARDINO, a Municipal Corporation, THE REDEVELOPMENT AGENCY OF THE CITY OF SAN BERNARDINO, a State Agency,

Respondents and Appellees.

Petition for a Writ of Certiorari to the Fourth District Court of Appeal or in the Alternative the Superior Court of the County of San Bernardino, State of California.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now, the petitioner, in a representative suit, on her own behalf and others similarly situated, prays that a Writ of Certiorari issue to review the Judgment of the Fourth District California State Court of Intermediate Appeals, or in the alternative the Superior Court of the County of San Bernardino, State of California, filed in the above case on June 25, 1965, upon which a timely application for rehearing was denied and hearing

thereon denied by the highest State Court, *i.e.* Supreme Court of the State of California, on the 18th day of August, 1965, without an opinion which Judgment thereupon became final.

Citations to Opinion Below.

The opinion of the Fourth District Court of Intermediate Appeals of the State of California is printed in Appendix B hereto.

Jurisdiction.

The Judgment of the Fourth District Court of Appeals was entered and filed June 25, 1965, and a timely Petition for Rehearing thereto denied July 9, 1965. Timely Petition for Hearing by the California Supreme Court was denied August 18, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257[3], to determine title, rights, privileges and immunities under the Federal Constitution of the United States in the course of the exercise of State authority.

Questions Presented.

The California Court of First Instance, Intermediate Court of Appeal, and Supreme Court, have failed and refused to pass upon Federal Questions expressly raised and presented before said Courts by petitioner, *i.e.*:

A. Whether a Municipal Corporation may render votes cast in a public Municipal election, involving electors political, property, and civil rights, ineffective.

B. Whether a Municipal Corporation may prevent property owners the right at a hearing provided therefor, to oppose on the merits, a Redevelopment Plan which qualified a Redevelopment Agency to acquire Federal Funds to condemn petitioners' property.

C. Whether electors may compel a referendum authorized and pursuant to State and Municipal Law upon a Redevelpment Plan of city-wide scope adopted by Ordinance of a Municipal Corporation which Ordinance abridged electors votes cast and counted ineffective, by creating a Redevelopment Agency contrary to the result of election duly held and counted.

Constitutional Provisions and Statutes Involved.

The Statutory Provisions involved are: The Constitution of the United States, XIV, Amendment, Section 1; Urban Renewal Law, Capital Grant Assistance, Chapter 42, Title 42, U.S.C.A. page 542; California Constitution, Article IV, Section 1; City Charter of San Bernardino, Article VII, Section 127 [b], and Article VII, Section 121. They are printed in Appendix A, *infra.*

Statement.

A. On the Question of Whether a Municipal Corporation May Render Votes Cast in a Public Municipal Election, Involving Electors Political, Property, and Civil Rights, Ineffective.

The City Council of the appellee Municipal Corporation by its Resolution No. 1896, by special Election held on November 7th, 1960, caused to be submitted to a vote of the electors of the City of San Bernardino, the following question:

> "Shall the Mayor and Common Council of the City of San Bernardino create and establish a redevelopment agency pursuant to the provisions of the California Community Redevelopment Act?"

The Majority vote on this question was "NO."

The Ordinance therefore adopted by the electors was, in substance, that:

> "THE MAYOR AND COMMON COUNCIL OF THE CITY OF SAN BERNARDINO SHALL *NOT* CREATE AND ESTABLISH A REDEVELOPMENT AGENCY PURSUANT TO THE PROVISIONS OF THE CALIFORNIA COMMUNITY REDEVELOPMENT ACT."

Section 127 [b] of Article VII of the Charter of the City of San Bernardino, in part, reads:

> ". . . any Ordinance proposed by petition, OR WHICH SHALL BE ADOPTED BY A VOTE OF THE PEOPLE, cannot be repealed or amended except by a vote of the people obtained in like manner." (Emphasis added.) [Supp. Clk. Tr. p. 40.]

The Ordinance adopted by a vote of the People was abrogated by Resolution 2361, adopted June 23, 1952, by the Common Council of the City of San Bernardino, which Resolution created and activated a local Redevelopment Agency, real party in interest and appellee herein. [Ex. 4 in evidence, at p. 8, 4th Civil No. 5983; See also Ex. 6.]

The Charter of the Municipal Corporation, had set up a standard which required that the class of voters which would adopt an Ordinance by the vote of the people have equal status with the class of voters which would vote upon an ordinance proposed by petition.

Said above mentioned Charter Section of the California Municipal Corporation provided two salient rules of law with respect to what may be adopted by electors:

(1) The first rule concerns: The adoption of an Ordinance *proposed by petition,*

(2) The second rule is: The adoption of an Ordinance which *has not been proposed by petition.*

The words "adopted by a vote of the people" (Sec. 127 [b] of Article VII of the Charter of the City of San Bernardino, *supra*) is a matter which was placed upon the ballot and *rejected* by a vote of the people.

The resolution which submitted the matter to a vote by the City Council of San Bernardino read as follows:

> "NOW THEREFORE, THE MAYOR AND COMMON COUNCIL OF THE CITY OF SAN BERNARDINO DO HEREBY ORDAIN AS FOLLOWS:
>
> "Section One: That a special election be, and the same is hereby called and will be held in the City of San Bernardino on the 7th day of November,

1950, for the purpose of submitting to the qualified electros of said City, *FOR THEIR APPROVAL OR REJECTION,* THE FOLLOWING PROPOSITION:

"'Shall the Mayor and Common Council of the City of San Bernardino create and establish a redevelopment agency pursuant to the provisions of the California Community Redevelopment Act?'" [Clk. Tr. p. 24; Ex. 4.]

The certificate of Election returns [Supp. Clk. Tr. p. 39] setting forth the results of the election was certified pursuant to Section 7921 [b] of the California Elections Code by the County Board of Supervisors under the Official Seal of the Clerk of the County of San Bernardino, wherein the Board of Supervisors issued a certificate of election that the greater number of votes cast were against the creation and establishment of a Redevelopment Agency.

SAID CERTIFICATE HAS NEVER BEEN SET ASIDE, CANCELLED, OR IN ANY MANNER ATTACKED, DIRECTLY OR COLLATERALLY; AND THE DECLARATION MADE BY THE VOTERS OF SAN BERNARDINO WHEN THEY VOTED ON "PROPOSITION 'A', REDEVELOPMENT AGENCY" AGAINST THE CREATION OR ESTABLISHMENT OF THE REDEVELOPMENT AGENCY HAS NEVER BEEN CHALLENGED NOR REPEALED.

The Ballot which was submitted to the electors [Supp. Clk. Tr. p. 38], contained nothing on the face

of the ballot to indicate that it constituted an election for fun, or that it was to be an advisory vote.

The State Municipal Corporation thereafter sought to assert that it was not bound by the vote of the electors, because the election did not count. The conduct of the Municipal Corporation in making ineffective the votes cast, wherein the electors (Citizens of the United States) in reality cast "blank votes", is contrary to the policy of the United States Constitution and an abridgement of the privileges and immunities of voters as well as a fraud upon them.

After the voters of the City of San Bernardino voted AGAINST THE ESTABLISHMENT AND CREATION OF A REDEVELOPMENT AGENCY and the County Clerk of the County of San Bernardino certified as to the votes cast, the Mayor of the City of San Bernardino, by resolution of the Common Council, was directed to write a letter to the corresponding Federal Agency to the effect that the Urban Redevelopment Program was cancelled by action "TAKEN BY THE VOTERS AT THE NOVEMBER ELECTION". [Supp. Clk. Tr. p. 31.]

The minutes of the meeting of the Mayor and Common Council in referring to the action taken by the electors, said: ". . . the Mayor was asked to write a letter setting forth the action of the Council in regard to the Redevelopment Program . . ." [Supp. Clk. Tr. p. 41.]

B. On the Question of Whether a Municipal Corporation May Prevent Property Owners the Right at a Hearing Provided Therefor, to Oppose on the Merits, a Redevelopment Plan and Thereby Qualify a Redevelopment Agency to Acquire Federal Funds to Condemn Petitioner's Property.

A description of the metes and bounds of the property subject to be taken for condemnation and redevelopment was recorded thereby casting a cloud upon the title of record of the real property and its beneficial uses.

Attorney Manuel Ruiz, Jr., at the hearing to oppose redevelopment on the merits, stated that he and his associate, Alexander Ruiz, were there to represent the Private Owners Mutual Redevelopment Association, composed of property owners and occupants of homes within the project area. [Tr. Final Plan, p. 38, lines 11-26.]

Mr. Ruiz, as Attorney for in excess of fifty property owners, stated at the public hearing provided therefor, his understanding that pursuant to Section 33565 of the California Health and Safety Code, in addition to considering the report of the Agency, the Common Council

> "shall provide an opportunity for all interested persons to be heard and shall take evidence and testimony concerning the matters under consideration." [Tr. Final Plan, p. 40, lines 8-13.]

> ". . . (S)ince it will be incumbent upon the Common Council, under Section 33571 of said Health and Safety Code, to make a statement of findings predicated upon information and evidence, which it must receive, it is our purpose in this open and pub-

lic hearing to submit information and evidence." [Tr. Final Plan, p. 40, lines 14-18.]

"It is our intention to go into detail concerning the factors which are delineated . . . in order that at this public hearing for the taking and consideration of evidence and testimony concerning those matters under consideration, the Common Council may be properly advised." [Tr. Final Plan, p. 41, lines 2-8.]

"It is our intention to call many witnesses, who will give testimony and information . . . that this Common Council may have the opportunity to consider the entire project area as a unit and be fully advised, as required by law." [Tr. Final Plan, p. 41, lines 8-15.]

Mr. Ruiz as Attorney on behalf of the property owners called attention to witnesses who would be adverse witnesses, and therefore not susceptible to involuntary appearance:

". . . (I)t will be necessary for us to call as witnesses the various members of the Redevelopment Agency, the Planning Commission, the Chief of Police, as well as other public officials which we deem necessary for a complete public hearing and the taking of information and presentation of evidence." [Tr. Final Plan, p. 41, lines 21-26.]

"Gentlemen of the Council, we feel that the period of time which we will need for said purpose—and we can start tonight—will be a period of three weeks to take testimony and elicit information at this public hearing before the Council, THE FIRST OPPORTUNITY FOR THE OPPO-

NENTS OF THE PLAN THAT HAS BEEN OFFERED." [Tr. Final Plan, p. 42, lines 1-8.] (Emphasis added.)

"Since this is a hearing . . . which will be judicially reviewed by a court of competent jurisdiction pursuant to Section 33746 of the Health and Safety Code, we are anxious to know how or in what manner for a full hearing, which is allowed by law, the allotted time which we need will be given." [Tr. Final Plan, p. 42, lines 7-14.]

The Attorneys for the property owners represented in this Petition, suggested that some rules "for hearing" be adopted [Tr. Final Plan, p. 42-45], and called attention to the following Municipal Charter provision:

"SECTION 34 OF THE CITY CHARTER OF THE CITY OF SAN BERNARDINO ALLOWS THIS COMMON COUNCIL TO ADOPT RULES FOR SUCH A HEARING AS IS NOW REQUIRED: This Council may compel the attendance of witnesses as well as the production of papers in any matters under investigation. IT IS OUR SUGGESTION THAT IN THE ADOPTION OF THE RULES FOR COMPELLING THE ATTENDANCE OF WITNESSES AND THE PRODUCTION OF PAPERS in matters under investigation we as attorneys for the property owners and occupants within the Project Area be advised by the Council of the type of notice or request which the Council may desire to compel the attendance of witnesses as well as the production of papers in matters under investigation." [Tr. Final Plan, p. 45, line 26, to p. 46, line 12.]

LACK OF DUE PROCESS AND ILLEGAL CONDUCT BY THE HEARING BODY, *i.e.* MEMBERS OF THE CITY COUNCIL APPEARS AS FOLLOWS:

Members of the Common Council at the hearing said:

". . . (W)e are not here to be told how we are to run a meeting." [Tr. Final Plan, p. 46, lines 25-26.]

". . . (H)e is not conducting this meeting, he is not setting up the procedure for holding this meeting . . ." [Tr. Final Plan, p. 46, lines 22-24.]

Inasmuch as the Attorneys were from Los Angeles and another person from Bakersfield asked to speak, a Councilman at said hearing said:

". . . *We are to hear people—not carpetbaggers from Los Angeles or Bokersfield.*" [Tr. Final Plan, p. 47, lines 1-2.]

". . . Under the procedure that he is suggesting it cannot be done." [Tr. Final Plan, p. 47, lines 4-5.]

"We are holding this HEARING HERE *TONIGHT*. . . . This will not be dragged out for several months." [Tr. Final Plan, p. 47, lines 5-6.] (Emphasis added.)

One Attorney representing the property owners then stated:

"Mr. Chairman, Attorney Flory [the City Attorney] has characterized my request as a request for a trial and cross-examination. I DID NOT SO REQUEST. I ADVISED THE COUNCIL THAT IT WOULD TAKE ABOUT THREE WEEKS TO PRESENT EVIDENCE, ORIGINAL EVIDENCE. I observe before me and before the Clerk a document, or many documents, 5 inches thick,

which the opponents of the Plan have not had an opportunity to examine, plans that have been formulated since 1952." [Tr. Final Plan, p. 48, lines 5-14.] (Emphasis added.)

Said Attorney, Mr. Ruiz, then said:

"Now I believe that this Council is ready to take evidence I would first like to call to the microphone and question for purposes of presenting evidence my first witness, Teodora G. Gallegos . . ." [Tr. Final Plan, p. 49, lines 2-5.]

Teodora G. Gallegos the proposed property owner witness was not permitted to submit her declarations with the assistance of her Attorney, who spoke Spanish, the same language in which said witness was proficient. Other proffered witnesses were not allowed to declare with the assistance of counsel of their choice.

Opponents to the Redevelopment Plan petitioners herein then tried to proceed with the Attorneys of their choice by making an "offer of proof." [Tr. Final Plan, p. 49, lines 25-26.]

Attorney Manuel Ruiz, Jr., then stated:

"WHILE I AM GOING THROUGH THIS, I AT THIS TIME WOULD LIKE TO REQUEST THIS COUNCIL TO PERMIT MY ASSOCIATE, ALEXANDER RUIZ, TO INSPECT WHAT I OBSERVE TO BE HUNDREDS OF PAGES OF PAPERS IN THE CUSTODY OF THE CITY CLERK." [Tr. Final Plan, p. 51, lines 17-21.] (Emphasis added.)

Mr. Howard, a member of the Common Council, made a motion to deny counsel the right to make offers

of proof whereupon Mr. Flory, the City Attorney, to make clear the meaning of the motion, then said:

> "As I understand, Mr. Howard, you wish to make a motion that the offer made by Mr. Ruiz to present the proof by stating what his witnesses would say if they were called as witnesses should be denied. Are you making such a motion?
> Councilman Howard: I so move." [Tr. Final Plan, p. 53, lines 22-26.]

The common council then prohibited the opponents of the plan from making an offer of proof through counsel of their choice which they had retained to assist them in presenting their evidence. [Tr. Final Plan, p. 55, lines 21-22.]

The only alternative left to the opponents of the plan was simply to read the names of the witnesses who would be called and who would, as Mr. Ruiz stated, answer "my questions and the answers that would be given by them on factors that should be taken into consideration by this honorable body." [Tr. Final Plan, p. 55, line 24, to p. 56, line 3.] Mr. Ruiz then identified by name and address twenty different witnesses he would call. [Tr. Final Plan, p. 56, line 4, to p. 58.]

The Mayor said that these witnesses should come up to speak through the microphone (purportedly without guidance from counsel), and Mr. Ruiz said:

> *"The next witness I would call and interrogate with respect to material evidence—some of these witnesses do not speak English; many of these witnesses have a poor education and do not know what is and what is not material with respect to the factors that this Council must take into con-*

> ***sideration and need and desire their constitutional rights of a right to counsel.*** [Tr. Final Plan, p. 58, lines 20-26.]

Attorney Ruiz then identified forty-five additional witnesses he would call. [Tr. Final Plan, p. 59, line 1, to p. 62, line 21.]

The attention of the Common Council was called to the fact that all of the witnesses "have expressed a desire that we as attorneys represent them." [Tr. Final Plan, p. 60, lines 1-2.]

Attorney Alexander Ruiz then spoke and on behalf of petitioner and appellant property owners stated that due to the City Council had limited the time, he had been given "about twenty minutes to a half hour to examine" the documents introduced at the hearing by the proponents to the plan; *i.e.,* the Revelopment Agency. [Tr. Final Plan, p. 65, lines 14-26.]

> "Now we have had in the last half an hour an opportunity to investigate work the Revelopment Agency has submitted here tonight and has been working on for, lo, many months and years. I with all my heart protest and state that an opportunity not to more thoroughly investigate the records, which are now public records, for purposes of introducing contrary evidence to the reports, is arbitrary, is capricious, and contrary to the spirit of the law that requires deliberation by members of the Council with respect to testimony." [Tr. Final Plan, p. 65, lines 4-14.]

Attorney Alexander Ruiz then tried, while the purported hearing was in progress, to review the documents which the Attorneys for the appellant property

owners had for the first time had an opportunity to peruse, and made a series of objections to the same, which, in effect, called attention to the fact that the documents were not under oath, did not have signatures, were photostatic copies, did not constitute evidence, no foundation of qualifications for many opinions therein, and other relevant and material objections. [Tr. Final Plan, p. 66, line 3, to p. 69, line 20.]

Attorney Alexander Ruiz, for the property owners, then stated:

> "I would like to indicate to the Honorable Council that I was present at the time the tentative plan for redevelopment was presented to this Council and approved, and the very same day I was in the Clerk's Office seeking to examine the contents of the file wherein all exhibits were required to be filed with the City Clerk. UPON EXAMINATION OF THE FILE I FOUND NONE OF THESE DOCUMENTS THAT I HAVE JUST REFERRED TO . . . On the date of the passage of the tentative plan I sought diligently for information lodged with either the City Council or the City Clerk upon which the tentative plan was based, and other than the tentative plan (consisting of a series of conclusions) just referred to, there was nothing." [Tr. Final Plan, p. 69, line 21, to p. 70, line 12.]

Attorney Alexander Ruiz stated further:

> "These documents have completely caught us by surprise by being filed today. We have had inadequate notice of their particular contents." [Tr. Final Plan, p. 70, lines 19-21.]

Attorney Alexander Ruiz continued:

> Under the Code it was provided that the *plans, reports, et cetera,* in support of the tentative plans should be filed with the City Clerk, and your City Clerk is present and I spent one entire afternoon with him. Now there is no indication to me as to what plans the Redevelopment Agency intended to use or should intend to use, and this is the first occasion that I know of that it has been called to my attention that these particular documents were to be presented at this meeting. Whether he had them in some file in his particular department I don't know. I understand that he has even additional reports that have not been submitted." [Tr. Final Plan, p. 72, line 20, to p. 73, line 7.]

Mr. Felton, The City Clerk of Appellee Municipal Corporation then stated that the documents "have a filing stamp, and the dates will speak for themselves." [Tr. Final Plan, p. 73, lines 8-12.]

The dates of filing were then read, which were dated July 1, 1958 [the date of the hearing, excepting Exhibit 17 of the Redevelopment Plan which was filed June 9, 1958 — Tr. Final Plan, p. 73, line 21, to p. 74, line 16], which was too late to have been considered, nor may the same be considered as relevant evidence before the Common Council on March 4, 1958, in support of the Tentative Plan.

Mr. Felton, said City Clerk, then said:

> "Those are the correct filing dates and they are not hidden. I COULD NOT GIVE THEM TO YOU WHEN YOU WERE IN, BECAUSE THAT'S WHEN I GOT THEM." [Tr. Final Plan, p. 72, lines 16-21.] (Emphasis added.)

Another witness, Mrs. James J. Cecil, then spoke and corroborated Mr. Ruiz's statement that she had assisted him in searching "very hard to get information", without avaiil [Tr. Final Plan, p. 75, line 21, to p. 76, line 6], after an explanation that until such time as information was filed, under the Health and Safety Code, it was not deemed to be a public record, as the Redevelopment Agency "is a proponent and has its own files . . ." [Tr. Final Plan, p. 75, lines 7-16.]

Attorney Alexander Ruiz stated:

> "Members of the Council, I would like to refer . . . to Section 33570, that when the legislative body approves a tentative plan for a project area the area shall be established, given a name and number. It shall thereafter be referred to as an approved redevelopment project area and all records or certified copies thereof in relation to the area shall be consolidated into one file designated by such name and number and preserved by the Clerk of the legislative body AS PUBLIC RECORDS.
>
> "Those are the official records, those are the public records, those are the only records which should be presented to this Council, and those are the ones in the file of the CITY CLERK, AND NOT IN HIS FILES, IN THE FILES OF THE REDEVELOPMENT AGENCY.
>
> "He may have dozens of documents there, but it cannot be presumed that this City Council took into consideration documents within the files of the Redevelopment Agency other than what were presented to it here and placed in the Ordinance file. "(Applause)". [Tr. Final Plan, p. 78, line 14, to p. 79, line 7.] (Emphasis added.)

C. Whether Electors May Compel a Referendum Authorized and Pursuant to State and Municipal Law Upon a Redevelopment Plan of City-Wide Scope Adopted by Ordinance of a Municipal Corporation Which Ordinance Abridged Electors Votes Cast and Counted Ineffective, by Creating a Redevelopment Agency Contrary to the Result of Election Duly Held and Counted.

To compel the Mayor and City Council to either repeal the Ordinance which adopted the Redevelopment Plan or submit it to the voters for approval or rejection, as required by Section 121 of the City Charter, a referendary petition was circulated among the voters. The Clerk of the Appellee City certified to the sufficiency of the signatures of the electors. [Clk. Tr. p. 52, Ex. 5 in evidence.]

IT HAD BEEN CONCEDED BY ALL PARTIES TO THIS ACTION THAT THE CREATION OF THE REDEVELOPMENT AGENCY BY THE MUNICIPAL CORPORATION WAS A LEGISLATIVE ACT. The electors in an open election had voted against the creation of an Agency, which Agency now acting *de facto* and not *de jure* had *sua sponte* by municipal fiat of the legislative body of said City undertaken to conduct a public hearing to adopt what at most would be phantom Redevelopment Plan without a valid enabling law by the Municipal Corporation to sustain it and therefore *ultra-vires* and void.

A petition for redress to order a referendum on the city-wide scope Redevelopment Plan by the electors of the City was denied by the appellee City of San Bernardino for purpose of balloting on the adoption or repeal of the ordinance submitted, even though petitioned for as provided by the City Charter. Again the acts of the electors were nullified.

Reasons for Granting the Writ of Certiorari.

State action cannot constitutionally take away from citizens the legal effect of a vote once cast in a free election, nor thereby illegally take away property rights, political, and civil rights, and privileges in order to acquire Federal Funds to finance local Redevelopment projects.

The acquisition of Federal Monies for the funding of local projects is of nation-wide import and of present national concern. Wherein every facet of activity involving Civil Rights, Education, Employment, Social and Economic objects and purposes are made available by the National Government in cooperation with local State Agencies, wherein local electors participate at the ballot-box in the adoption or rejection of the same.

It is of general consequence that when a Federal Law requires a State, for the specific purpose of acquiring Federal Funds, to give a public hearing following notice of the date, time, and place, and the purpose of such hearing, as a condition to the taking away of certain rights and privileges of a specific segment of the State and Federal Citizens that the Supreme Court enforce rules as to what due process consists of to acquire Federal Funding for State objectives.

Two aspects of this case were before the United States Supreme Court by the same petitioners in the case at bar during its October term 1959, upon petition for certiorari by appellant electors and property owners from a denial of prohibition and mandate by the State Court AND BEFORE TRIAL ON THE MERITS AND JUDGMENT IN SAID STATE COURT, the United States Supreme Court denied certiorari.

In moving for a dismissal of the petition for certiorari before the United States Supreme Court during its October term 1959, appellees in the case at bar used the following language:

> "IT THEREFORE APPEARS THAT THE APPEAL SHOULD BE DISMISSED FOR FAILURE OF APPELLANT TO PROPERLY RAISE THE ALLEGED FEDERAL QUESTIONS IN THE CALIFORNIA COURTS SO THAT SUCH FEDERAL QUESTIONS WOULD BE DIRECTLY PASSED UPON BY THOSE TRIBUNALS. THEREBY GIVING THIS COURT THE BENEFIT OF THE PRESENTATION, AUTHORITIES CITED, AND RULING OF THE COURT DIRECTLY ON SUCH FEDERAL QUESTIONS." [Ex. 83 in evidence, p. 3.] (Emphasis added.)

Unlike the situation which existed during the 1959 October term of the Supreme Court petitioner has now exhausted all State Administrative and Judicial remedies and raised in a timely fashion all Federal Questions, and the case has reached the point of maturity which requires review by the United States Supreme Court.

Upon the full and complete record in the instant proceedings before the Trial Court, said State Trial Court simply refused to consider or pass upon the Constitutional issues raised, and all Appellate State Courts in the case at bar have assumed that denial of certiorari by the Supreme Court in its October term 1959, was tantamount to a final disposition adversely to said petitioner of the Constitutional Points of Law.

The record now before the United States Supreme Court shows that attention has been called to the State

Intermediate Court of Appeal in the case at bar from the Judgment of the Trial Court below, upon the current complete record and after a trial on the merits, that no State Court had heretofore considered any theory relating to the Constitution of the United States. (Petition for hearing, Appendix C.)

Attention has heretofore been called to all State Courts that no claim of denial of due process, equal protection of the laws had been contended or mention made of the abridgement of the privileges of electors in the exercise of the Civil and Political Rights, nor violation of procedural due process had been made or considered in the prior State Court proceedings which formed the basis of the petition for certiorari to the United States Supreme Court in its October term of 1959.

The State Court of Intermediate Appeals to which this petition for writ of certiorari is directed has continued to assume as did the Trial Court, that petitioner could have and therefore should have raised said Federal Issues before, in the former cases, and having failed to do so is now precluded by *res judicata* from raising at this time upon a new record below the Federal Constitutional issues which have at all times remained and still continue to remain unsettled. The failure by said State Trial Court and Intermediate Court to consider and rule thereon, and instead conclude that Federal issues and matters are foreclosed from further inquiry or consideration by reason of *res judicata* by the Supreme Court of the United States constitutes error, and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

This case takes us into the more recently articulated field of what constitutes a "vote" formerly relegated to the "political ticket" as non-justiciable, wherein the Supreme Court has now declared that ". . . the right of suffrage may not be qualified because of some administrative benefit to the State. (*Carrington v. Rash,* 13 Lawyers Ed. 2d 675, March 1, 1965) (..... U.S. .....) The fencing out from the franchise of a sector of the population because of the way it may vote, is constitutionally impermissible. The political views of a particular group of bona fide residents, cannot be constitutionally obliterated . . ."

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MANUEL RUIZ,
Counsel for Petitioner.

APPENDIX "A".

Constitutional Provisions and Statutes Involved.

(1) The Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) The Urban Renewal Law, which authorizes States to pass enabling Legislation for Federal Capital Grant Assistance, appears in Chapter 42, Title 42, U.S.C.A. at page 542. One of the limitations to acquire Federal Funds is:

> "1. No land for any project to be assisted under this subchapter shall be acquired by the local agency except after public hearing following notice of the date, time, place, and purpose of such hearing."

(3) The Constitution of the State of California, Article IV, Section 1, reads as follows, to-wit:

> "INITIATIVE AND REFERENDUM POWERS RESERVED TO CITIES AND COUNTIES. The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city, and county, city and town of the State to be exercised under such

procedure as may be provided by law. Until otherwise provided by law, the legislative body of any such county, city and county, city or town may provide for the manner of exercising the initiative and referendum powers herein reserved to such counties, cities and counties, cities and towns, but shall not require more than fifteen percent of the electors thereof to propose any initiative measure nor more than ten percent of the electors thereof to order the referendum. Nothing contained in this section shall be construed as affecting or limiting the present or future powers of cities or cities and counties having charters adopted under the provisions of Section 8 of Article XI of this Constitution. In the submission to the electors of any measure under this section, all officers shall be guided by the general laws of this State, except as is herein otherwise provided. This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved. [As amended November 8, 1938]"

(4) San Bernardino City Charter adopted pursuant to Article XI of the California Constitution, pursuant to which the electors voted against the creation of a Redevelopment Agency.

Article VII, The Initiative, City Charter, City of San Bernardino, Section 127 [b], [Supp. Clk. Tr. p. 40] to-wit:

"The ballots used when voting upon said proposed Ordinance shall contain the words 'For the Ordinance' (Stating the general nature of the proposed

Ordinance) and 'Against the Ordinance' (Stating the general nature of the proposed Ordinance). If a majority of the qualified electors voting on said proposed Ordinance shall vote in favor thereof, such Ordinance shall thereupon become a valid and binding Ordinance of the City; and any Ordinance PROPOSED BY PETITION, OR WHICH SHALL BE ADOPTED BY A VOTE OF THE PEOPLE, CANNOT BE REPEALED OR AMENDED EXCEPT BY A VOTE OF THE PEOPLE OBTAINED IN LIKE MANNER."

(5) Article VII, The Referendum, City Charter, City of San Bernardino:

"Section 121. No Ordinance passed by the Common Council . . . shall go into effect before thirty days . . . if during said thirty days a petition signed by the electors . . . protesting against the passage of said Ordinance, be presented to the Council, the same shall thereupon be suspended from going into operation, . . . and if the same is not entirely repealed, the Council shall submit the Ordinance proposed to the vote of the electors of the city . . . and such Ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same, shall vote in favor thereof."

APPENDIX "B".

Opinion of the District Court of Appeal.

In the District Court of Appeal, Fourth Appellate District, State of California.

Charlotte Andrews, Petitioner and Appellant v. The City of San Bernardino, a municipal corporation, et al, Respondents. 4 Civil No. 7393.

Filed: June 25, 1965.

Appeal from a judgment of the Superior Court of San Bernardino County. Herbert V. Walker, Judge. Affirmed.

Ruiz & Ruiz and Manuel Ruiz, Jr., for Petitioner and Appellant.

Waldo Willhoft & William J. Ward for Respondents.

This is an action wherein petitioner seeks in the first count of her petition a judicial review of the proceedings of the Mayor and City Council (Council) of the City of San Bernardino (City), and of the proceedings of the Redevelopment Agency of the City of San Bernardino (Agency), as provided for by Health and Safety Code, section 33746. (All references to Health and Safety Code having to do with Community Redevelopment Law are to the law and the numeration of code sections as they were in 1958, unless otherwise specified.) In a second count, petitioner seeks a writ of mandate to compel a referendum to the voters of City of an alleged legislative act of Council by which it approved a final redevelopment plan for Meadowbrook Project No. 1. Petitioner also sought a preliminary injunction to restrain Council and Agency from any other proceeding until final determination of this action.

A demurrer to the second cause of action was sustained without leave to amend; and the temporary injunction was denied. From the order sustaining demurrer without leave to amend and the order denying the application for temporary injunction, petitioner took an unsuccessful appeal, the decision in which is reported as *Andrews v. City of San Bernardino,* 175 Cal. App. 2d 459. Petitions for rehearing and for a hearing by the Supreme Court were denied.

The action was tried upon the first cause of action of the complaint. The issues were defined in the pre-trial conference order made May 7, 1962, as follows:

"(1) The sufficiency of the evidence to support the findings and determination made by the City Council.

"(2) Was the action by the City Council arbitrary, capricious and not done in good faith?

"(3) The jurisdiction of the City Council to hear and determine the subject matter."

Bearing upon those issues, appellant made certain contentions set out in the pre-trial order as follows:

"(1) That a Municipal Corporation may not

"(a) abridge electors privileges by creating a Redevelopment Agency contrary to result of an election;

"(b) deprive property owners of right to present evidence;

"(c) develop property in a discriminatory manner;

"(d) reject offered evidence;

"(e) refuse to act upon a sufficient petition;

"(f) arbitrarily adopt rules characterizing and defining 'legislative acts' and 'adjudicatory proceedings.'

"(2) That the decision of the District Court of Appeal in the case of *Andrews v. City of San Bernardino,* 175 C.A. 2d, is unconstitutional; and that the decision of the District Court of Appeal in the case of *Andrews v. City of San Bernardino* in the 4th Civil No. 5983, November 19, 1959, (unreported) is unconstitutional.

"(3) That the evidence does not support the findings and determination of the City Council."

The references to the creation of a redevelopment agency contrary to result of an election have to do with an election held in San Bernardino in 1950 at which Council submitted to the voters the question:

"Shall the Mayor and Common Council of the City of San Bernardino create and establish a redevelopment agency pursuant to the provisions of the California Community Redevelopment Act?"

The majority vote on the question was "No." In consequence of the result of that election, appellant has continued to insist that no such agency could be established without an affirmative vote of the people. That contention was decided adversely to appellant in *Andrews v. City of San Bernardino,* 175 Cal. App. 2d 454, in which petitions for rehearing and for hearing by the Supreme Court were denied.

Notwithstanding the prior rulings of the highest court of this state, appellant has again sought to litigate

the question whether Council had the power by resolution to establish Agency despite the result of the 1950 election, and the question whether Ordinance No. 2233 was subject to the referendum process. She does this on the claim that the creation of Agency without a popular vote, and the refusal of the referendum of Ordinance No. 2233 approving the final plan to the voters alike denied her the right to vote and the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

Nevertheless, appellant had appealed to the United States Supreme Court from the decisions in *Andrews v. City of San Bernardino, supra,* 175 Cal. App. 2d 454, and in *Andrews v. City of San Bernardino, supra,* 175 Cal. App. 2d 459. Both appeals were dismissed and petitions for hearing ware denied in both matters.

On a third occasion prior to this appeal, appellant sought the intervention of the upper courts. An order having been made in the instant case sustaining objections to certain interrogatories propounded by appellant, she sought mandate from this court in case 4 Civil No. 6695. The petition was denied in this court and a petition for hearing by the Supreme Court was also denied.

This is the explanation of the contentions quoted from the amended pre-trial order numbers therein 1 (a), 1 (e) and 2.

In her brief, she returns to the attack upon the order sustaining objections to interrogatories as being

violative of her right to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. However, neither the order nor the proposed interrogatories have been made a part of the record on appeal.

Appellant raised also before the trial court another question previously finally adjudicated adversely to her by the decision in 175 Cal. App. 2d 454, which was the refusal of Council to grant a second continuance for a 90-day period of the hearing on the appeal of the tentative plan.

The trial court concluded that as to the three contentions passed on by the District Court of Appeal in the two cases reported at 175 Cal. App. 2d 454 and 175 Cal. App. 2d 459, those adjudications were final and binding.

The trial court found in favor of respondents on all the issues.

On appeal, appellant renews all the contentions made by her before the trial court and urges the insufficiency of the evidence at the hearings on both the tentative and final redevelopment plans to support the findings and determinations made by Council in its ordinances.

THE QUESTION OF RES JUDICATA

Appellant's argument that the prior decisions of this court are not conclusive as to the matters therein determined may perhaps be stated as follows:

As the result of the 1950 election, a redevelopment agency could be established only by popular vote; to permit the establishment of the agency without a popu-

lar vote denied appellant her right of franchise, and constituted a deprivation of the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution. To refuse to submit the ordinance approving the final plan to referendum was a similar denial of the equal protection of the law. Those constitutional questions were not presented to or considered by this court in its prior decisions; in consequence the Supreme Court of the United States dismissed the appeals because the federal questions had not been raised in the state court; appellant has a right to have those matters passed upon by the United States Supreme Court; therefore the prior decisions cannot be conclusive as to the federal questions, so that those questions may now be considered for the first time; moreover, decisions of the United States Supreme Court bearing upon the rights of electors to vote have been rendered since the earlier decisions of this court so as to require a reexamination of the matters there involved in the light of such "right-to-vote" decisions.

The doctrine of *res judicata* applies to issues of law including those decided by an appellate court. (*White v. Fresno Nat. Bk.*, 98 Cal. 166; *Phillips v. Patterson*, 34 Cal. App. 2d 481.)

Even a judgment erroneous in law constitutes a conclusive determination of the matters decided. (*Panos v. Great Western Packing Co.*, 21 Cal. 2d 636; *Stark v. Coker*, 20 Cal. 2d 839.)

The conclusiveness of the judgment extends to every reason and point that might have been urged in support of a cause of action or defense. (*Sutphin v. Speik*, 15 Cal. 2d 195, 202; *Krier v. Krier*, 28 Cal. 2d 841.)

WHAT MATTERS WERE FINALLY ADJUDICATED IN THE EARLIER DECISIONS OF THIS COURT?

1. That there was no abuse of discretion on the part of Council in denying appellant's request for a continuance of the hearing on the Tentative Plan or as to any other matter which might have been urged going to the jurisdictional basis of Ordinance No. 2217 which approved the Tentative Plan. The decision in *Andrews v. City of San Bernardino,* 175 Cal. App. 2d 454, is conclusive as to all such matters.

2. The same decision is conclusive that the adoption of the original Resolution No. 2361 of June 23, 1962, finding the need for and establishing a redevelopment agency was a valid act that did not require the initiative process.

3. The second decision found at 175 Cal. App. 2d 459 is a final adjudication of the following issues:

That Ordinance No. 2233 which adopted the Final Plan is not subject to the referendum process.

That appellant in the present action does act in a representative capacity on behalf of any other persons.

That in the proceedings under attack the City Council acted in an administrative and not a legislative capacity.

Appellant may not relitigate those issues. She may be comforted, however, by the reflection that the prior decisions were correct as to the matters of law decided therein.

Part 1 of division 24, Health and Safety Code, numbered as sections 33000 to 33954, is a comprehensive

plan with state-wide scope for the redevelopment of blighted areas.[1]

The state has invested the legislative body of a city with power to act within the framework of the Community Redevelopment Law. City is a chartered city which had no right under its charter to take the kind of action authorized by the State Redevelopment Law. Nor could City curtail its rights under that law except by an amendment to its charter. The 1950 election did not purport and was not effective to amend the charter.

In dealing with the question whether the state-endowed power of eminent domain given by general law to cities could be denied to a chartered city by an initiative ordinance, it was said in *Alexander v. Mitchell,* 119 Cal. App. 2d 816, at page 821:

> "While the initiative and referendum deal with the reserved powers of the people and should be liberally construed to uphold the power wherever that reasonably can be done (*Collins v. City and County of San Francisco,* 112 Cal. App. 2d 719 [247 P. 2d 362]), nevertheless the right of eminent domain is a matter of statewide concern and being such cannot be abrogated by the people of a municipality. A city has no inherent power of eminent domain. (*City of Los Angeles v. Koyer,* 48 Cal. App. 720 [192 P. 301]; *Mackay v. City of Los Angeles,* 136 Cal. App. 180 [28 P. 2d 706].) It exercises it only because authorized by the state Legislature. Section 1241, Code of Civil Procedure, vests the power to make the determination of convenience and necessity in the members of the legislative body of a . . . city. Those members could

not do away with the power of eminent domain; neither can the people of a particular community. The legislative body, the council, can determine whether in a particular instance the public convenience and necessity require its exercise, but it could not determine, as this ordinance attempts to have the people do, that as to all off-street parking sites hereafter to be acquired the power need not be exercised. Such a finding, in effect, is an attempt to completely abrogate that power,—a vastly important power."

The court went on to say at page 822:

"Petitioner contends that the people have reserved to them all legislative rights; that the determination of whether the public necessity and convenience requires the acquisition and construction of off-street parking projects is a legislative matter; therefore the people may take away from the council the right to make such determination and make it themselves. Disregarding the state question involved and assuming the correctness of the contention, the taking away from the council of the right to make such determination cannot be done by ordinance; it could only be done by a charter amendment."

(Cf. *Laguna Beach Taxpayers' Assn. v. City Council,* 187 Cal. App. 2d 412 and *Marvynne v. Acker,* 189 Cal. App. 2d 558, 562.)

While a purely advisory election is a nullity (*Galindo v. Walter,* 8 Cal. App. 234; 21 Ops. Atty. Gen. 100), the 1950 election could not have had any other significance, for the reasons stated hereinbefore.

There is nothing in the following decisions which compels a conclusion different from that reached by this court in its earlier decisions: *Schildmachter v. City of Compton,* 14 Cal. 2d 342; *Hughes v. City of Lincoln,* 232 A.C.A. 897; *O'Loane v. O'Rourke,* 231 A.C.A. 848; *Reagan v. City of Sausalito,* 210 Cal. App. 2d 618.)

O'Loane v. O'Rourke, supra, 231 A.C.A. 848, dealt with the right to have submitted to a referendum a resolution of the city council adopting a "General Plan," authorization for which is now found in sections 65090 et seq., Government Code.

In that case, the court said at page 858:

> "The matter of the adoption of a general plan in a city is purely a local matter and is not a matter of statewide legislative concern."

It is clear from the quoted portions of the Redevelopment Law that in establishing a redevelopment agency, the local legislative body engages in the implementation of a state-wide policy under powers delegated to it by the state, of which it may not be divested except by action of equal dignity; which at the local level would require a charter amendment.

We conclude therefore that the 1950 election had no effect upon the powers delegated to Council.

THE REFERENDUM QUESTION

The powers of initiative and referendum reserved to the electors of each city by article 4, section 1 of the California Constitution are correlative. Those matters subject to the initiative are subject to the referendum; and the converse is true.

It follows that for the reasons stated the acts of Council in exercising the state-delegated authority are subject neither to the initiative nor referendum powers of the electors of City under its existing charter.

This court, in *Andrews v. City of San Bernardino,* 175 Cal. App. 2d 459, held correctly that Ordinance No. 2233 approving the final plan was not legislative in character, and therefore not subject to referendum. If any step in the process were subject to the referendum as being legislative, it would have been the resolution adopted June 23, 1952, finding need for Agency. The subsequent proceedings are of the class described as administrative to implement the policy then decided upon.

THE FEDERAL QUESTION

The doctrine of *res judicata* does not permit appellant to raise a point which might have been presented in the earlier proceedings. It may be observed, however, that equality in voting rights means the equal right of a person qualified by age and free from such disabilities as would operate as to all persons alike to vote with all other electors. The denial of that right is the denial of the equal protection of the laws. Appellant here has experienced no such denial. Nor has she been affected by that partial disfranchisement which may be said to result where one of two or more legislative representatives is elected from a district grossly disproportionate in population to another.

The real issue is whether the initiative and referendum apply. If they do not, appellant has not been deprived of a right to vote. (See *Williams v. City of San Carlos,* 233 A.C.A. 339, decided March 30, 1965.)

The rights of initiative and referendum are declared in the Constitution of the State of California, not in the Constitution of the United States. It is only because the denial of those rights would be a denial of the equal protection of the laws of California that it would also be a denial of such rights under the United States Constitution.

The provisions of article 1, section 11 of the California Constitution "have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution." (*Dept. of Mental Hygiene v. Kirchner,* 62 A.C. 613.)

Appellant has not been denied the equal protection of the laws as guaranteed by either the United States Constitution or the California Constitution.

THE SUFFICIENCY OF THE EVIDENCE

Appellant urges that the evidence before Council at the hearings on both the tentative and the final plans was insufficient to support the findings on which the ordinances adopting said plans respectively were based.

The trial court was not to reweigh the evidence and was only to determine whether the findings and determination of Council were supported by substantial evidence. (*In re Redevelopment Plan for Bunker Hill,* 61 Cal. 2d 21, 40; *Berggren v. Moore,* 61 Cal. 2d 347.)

Notwithstanding her claim that the determinations made by Council in the ordinances adopting both tentative and final plans had no substantial evidence to support them, but without abandoning that claim, she urges that the question of the lack of substantial evidence is

immaterial because of the denial of a fair hearing to the opponents of the plan.

Appellant on appeal makes no claim that any evidence was improperly received by the trial court. It is assumed, therefore, that all evidence before the trial court was properly received, some of it, from the record, for limited purposes. It consists in part of all of the documentary material available to Council on the hearings on the tentative plan and the final plan, as well as typewritten transcripts of the oral proceedings at both of those hearings.

The documentary evidence received at the trial consists of not less than 79 exhibits (93 were numbered for identification).

The reporter's transcript of the four-day trial runs to 339 pages. The oral testimony of witnesses, including the questions, interjections and statements of counsel, take up only 72 pages of the transcript.

It seems basic in appellant's position that hearings on both the tentative and the final plans should have been conducted in the manner of adversary judicial trials.

That position is erroneous, with the qualification that consideration be given by Council to oral evidence under oath as mentioned hereinafter.

There are general rules applicable to hearings before administrative and legislative bodies, which permit not only hearsay evidence but also decisions based solely on such evidence.

Some of the reasons for those procedures are found in "Administrative Law Treatise" by Kenneth Culp Davis.[2]

Professor Wigmore has expressed his opinion that the rules of evidence applicable in court trials are not reasonably to be considered necessary in administrative hearings.[8]

Our Legislature has specifically exempted certain types of hearings from technical rules relating to evidence and witnesses (cf. Water Code, §1353; Unemployment Insurance Code §1952; etc.)

In distinction to those statutes, section 11513 of the Government Code provides for the right to call and examine witnesses and to cross-examine opposing witnesses; and explicitly provides that oral evidence shall be taken only on oath or affirmation. The section declares, also, that: ". . . the hearing need not be conducted according to technical rules relating to evidence and witnesses."

That section of the Government Code deals with a hearing to determine whether a right, authority, license or privilege should be revoked, suspended or limited (§11503) upon the basis of specific factual accusations, or should be granted (§11504) based upon a statement of specific issues.

Without having been held under the Government Code, the hearings dealt with in such cases as *La Prade v. Dept. of Water & Power,* 27 Cal. 2d 47; *Kinney v. Sac. etc. Retirement System,* 77 Cal. App. 2d 779, have all of the aspects of trials of defined, disputed issues of fact between identifiable specific adversaries.

It is easy enough to distinguish hearings of that type from those whose purpose is to form a policy or to implement a policy already determined, involving political and economic considerations affecting a community,

such as was considered in *Flagstad v. City of San Mateo,* 156 Cal. App. 2d 138. Hearings of a city council upon a tentative or final redevelopment plan seem to be of the latter character.

The question has been similarly decided as to hearings before Agency by Berggren v. Moore, supra, 61 Cal. 2d 347, 350-351.[4] Such also, as to hearings before the agency, was the holding of the New Jersey court in Wilson v. Long Branch, 142 A. 2d 837, cited by respondent.

Concerning the hearing on a tentative plan, section 33565 (c) declares that Council shall "Take other evidence and testimony presented."

Concerning the hearing on a tentative plan, section section 33730 provides:

> "The legislative body shall consider the redevelopment plan of a project area submitted by the agency, any alternative plan submitted pursuant to this part, and all evidence and testimony for or against the adoption of the plans."

The Legislature, in sections 33565 and 33730 of the Health and Safety Code has distinguished between testimony and other evidence.

Generally, "testimony" means an oral statement under oath. (Sheppard v. Board of Supervisors, 137 Cal. App. 421; Black's Law Dictionary, 3rd ed.; Bouvier's Law Dictionary.)

Mann v. Higgins, 83 Cal. 66, 69, states:

> ". . . 'evidence' is the more comprehensive word, and includes 'testimony,' which latter, strictly speaking, means only that evidence which comes from living witnesses who testify orally."

The Health and Safety Code provisions quoted do not provide the specific scheme for the presentation of evidence such as is found in section 11513, Government Code, supra.

This leads to the conclusion that Council had a duty to consider any sworn oral evidence presented to it bearing upon the issue to be determined by it.

In essence, then, the sufficiency of the evidence in the hearings before Council depends upon whether the reports and other documentary material considered by Council could properly be considered by it in arriving at its decisions.

However, we do not consider that in the quotation from Berggren v. Moore, supra, 61 Cal. 2d 347, 350-351, the Supreme Court intended to suggest that only sworn testimony could afford a basis for Council's determinations, or even that some sworn testimony must be received by Council; nor were those questions before the Supreme Court for decision in that case.

Furthermore, the hearing on the final plan was held prior to the adoption of section 33730.5 (since repealed and replaced by section 33361, Health and Safety Code) referred to in Berggren v. Moore, supra, 61 Cal. 2d 347, 350-351. Those sections require notice of a time when "all persons . . . who deny the existence of blight" may appear. There was no such requirement in 1958.

HEARING ON THE TENTATIVE PLAN

In her first petition for writ of mandamus, appellant attacked the validity of the ordinance approving the tentative plan because her request for a further continuance of the hearing thereon had been denied. The

pivot of that attack was a claimed denial of due process. She now urges these other matters as a denial of due process, in that same hearing, notwithstanding the prior final adjudication. We rule as to those contentions as follows:

Section 33565 (c), Health and Safety Code, quoted above, does not mean that Council cannot act without receiving testimony (oral evidence under oath) if none should be presented.

It is possible that no such testimony might be presented, and that no person might wish to be heard. In such situation, Council, upon a consideration of the report of Agency and the recommendation of the planning commission, if any, might approve or reject the tentative plan.

Neither appellant nor any other person presented or offered to present any testimony at the hearing on the tentative plan.

The law requires that at the hearing all interested persons must be given an opportunity to be heard. However, of the 61 typewritten pages of the transcript of the hearing on the tentative plan (2 out of 63 pages are blank), over 25 pages are occupied by statements of opponents including the present appellant personally, and Mr. Manuel Ruiz (Mr. Manuel), who with his brother, Mr. Alexander Ruiz (Mr. Alexander), are her counsel of record in this proceeding.

At the continued hearing on the tentative plan, held March 24, 1958, no sworn testimony was presented or offered. At that time Mr. Manuel presented appellant's request for a continuance of 90 days, in addition to the 20-day continuance already enjoyed, to present a report

from one Babcock. As pointed out by counsel for respondents, more than 90 days had elapsed before the July 1 hearing on the final plan, but no Babcock report was then mentioned as having been completed or being in process.

An examination of the voluminous documents available to and presumably considered by Council at the hearing on the tentative plan makes it clear that there was substantial evidence to support the findings set forth in Ordinance No. 2233 adopting the tentative plan.

Was that evidence proper for Council to consider because not formally offered and received into evidence by Council? Yes, the formal offer and receipt into evidence is not required at such a hearing.

Was it proper for Council to consider such evidence because not given under or identified under oath? Yes. Section 33565, Health and Safety Code, provides:

> "At the hearing the legislative body shall:
>
> "(a) Consider the report of the agency and the recommendation and report of the planning commission.
>
> "(b) Provides an opportunity for all interested persons or agencies to be heard and receive and consider written communications with reference to the tentative plan.
>
> "(c) Take other evidence and testimony presented concerning the matters under consideration."

The Council's findings are not required to be based upon evidence which would be admissible in an adversary judicial trial.

Section 33571 provided specifically that the ordinance adopting the tentative plan should include "(b) A statement of findings, based upon surveys, investigations, and reports of public agencies, and any other information . . ."

There was no denial of due process or of fairness in the hearing for the adoption of the tentative plan.

The trial court correctly found that Council did not act arbitrarily or capriciously and did not abuse its discretion in the conduct of the hearings upon and in adopting the tentative plan, and that the proceedings leading thereto were regular.

PETITIONER'S ATTACK UPON THE HEARING FOR ADOPTION OF THE FINAL PLAN.

A question arises as to appellant's standing concerning the hearing on the adoption of the final plan. Her right as an owner of property within the boundaries of the project to question the validity of the jurisdictional steps in the proceedings is beyond dispute. Not so clear is her right to attack the proceedings on some of the points urged in her briefs.

At the hearings on the tentative plan, Mr. Manuel appeared for appellant, who was present in person also at the first of those hearings. Although Mr. Manuel and Mr. Alexander were present at the hearing on the final plan, it was not stated to Council that either Mr. Manuel or Mr. Alexander represented appellant at that meeting; appellant was not one of the 73 persons named, person by person, by Mr. Manuel as witnesses; appellant personally made no requests of or offers to Council; her name was mentioned only once by Mr. Manuel,

from which one would not infer that Mr. Manuel pretended to represent appellant at the meeting or that she was present.[5]

The transcript of the oral proceedings at that meeting points up what has been said.[6]

Mr. Manuel desired to do these things at the meeting on the adoption of the final plan:

Examine as many as 73 witnesses by the method of question and answer.

Examine other witnesses who presumably had furnished to Agency evidence in support of the redevelpment plan (the chief of police, members of the commission and other public officials).

Have Council adopt rules for the subpoening of those official witnesses for some future time.

Have Council allow Mr. Manuel and his brother further time for the examination and analysis of the proposed plan and its underlying reports, maps and surveys.

Extend the hearing over an indefinite period to allow for some three weeks in the presentation of evidence.

Have Council, after it had ruled that evidence would not be presented by means of question and answer, receive an offer as to what questions he expected to ask his 73 witnesses and what answers he expected those witnesses to give.

It is because of Council's refusal to do any of those things in the precise manner desired by Mr. Manuel that appellant partly bases her claim of a denial of due process in the conduct of the hearing.

Appellant makes these additional objections to the conduct of the hearing:

None of the documentary material before Council was sworn to or identified by oath.

No testimony under oath was presented at the hearing.

Matters were considered which were not embodied in any records and not presented as evidence.

All of this, appellant insists, was a denial of due process and of her right to be represented by counsel. She asserts that inherent in the right to counsel is the right to have counsel elicit evidence by questions put to a witness, and to have counsel cross-examine as to all evidence to be considered.

For the purpose of dealing on the merits with some of appellant's contentions, we will assume that Mr. Manuel and Mr. Alexander represented appellant in the hearing on the final plan.

At the hearing held July 1, 1958, to consider the final plan, Council had before it the redevelopment plan which on its face conformed to sections 33700 through 33711, Health and Safety Code.[7]

No alternative plan was submitted. It is true that there are in evidence in the case at bench two documents entitled on the face sheets "Meadowbrook Owners Redevelopment Plan — Private Owners Mutual Redevelopment Association." All but three other of their combined 49 sheets are for signature; one page sets forth the matters to which the signatures are appended. Briefly, those are a declaration of a purpose to get along without the redevelopment agency.

Those documents had been before Council at the time of the first hearing on the tentative plan.

Although section 33730, Health and Safety Code, states that Council "shall consider . . . all evidence and testimony for or against the adoption of the plan," it is conceivable that no such testimony might be offered.

We do not think that the section requires that all evidence considered be given by witnesses under oath; nor that all persons who had supplied information contained in the proposed plan be available for or subject to cross-examination.

Healuth and Safety Code, section 33706,[8] seems to permit Council to determine from the plan itself the economic feasibility of the plan required to be determined under section 33731.

It follows that the Legislature intended that Council might make its determinations on the basis of the proposed plan itself in the absence of other evidence.

Mr. Manuel was offered the opportunity to present testimony.[9]

Mr. Manuel preferred not to have his witnesses testify unless by the method of question and answer. A refusal to permit that method he considered a denial of the right to counsel.

While Mr. Manuel had the right to present oral evidence under oath, he did not have the right to demand that it be presented by question and answer. To refuse him that opportunity was not a denial of due process or of the right to counsel, nor did it contravene the provisions of section 33730, Health and Safety Code.

His offer of proof was made on the basis of the refusal of Council to permit the presentation by question and answer. The rejection of the offer of proof

was, therefore, no more prejudicial than the refusal to permit the question and answer procedure.

Moreover, Council offered to receive and consider the written statements of his witnesses in the form of question and answer. Mr. Manuel refused to submit them.

Those who wished to speak against the plan were invited to do so. To that invitation, Mr. Manuel responded: "I believe that the proper inquiry should be does anybody else wish to be heard that is not represented by the attorneys." Four persons did speak against it, without asking to be sworn. Mr. Alexander made statements of fact as though expecting credence, without asking to be sworn.

Council was presented with the problem of dealing with an attorney who had been interested in opposing the redevelopment plan for at least five months; who appeared at the hearing which had been set to consider adoption of the final plan as though the hearing were a pre-trial conference for the purpose of establishing times and procedures for a future hearing; who sought an opportunity to have witnesses subpoenaed for a future date without having made any attempt to arrange for their presence at the time noticed for the hearing; who spoke of calling as witnesses most of the occupants of the area within the project's boundaries, within which there were 186 residential units; who had apparently some 73 persons present as witnesses whom he proposed to have testify in answer to questions similar to those outlined by Mr. Manuel for Teodora G. Gallegos.

In intracommunity controversies of the sort involved here, proponents and opponents of a project may ap-

pear in large numbers. It is not to be considered a requirement of due process that each of those persons should separately or through separate counsel examine or cross-examine a number of witnesses whom they might wish to have called before Council. While such a variety of examiners was not suggested at the July 1 hearing, such could be a logical effect of appellant's contention.

Article 2, chapter 4, part 1, subdivision 24 of Health and Safety Code, comprising sections 33730 through 33747, deals with the adoption of a final plan.

Council did not have a duty to permit the presentation of sworn oral evidence as to matters not required to be determined by section 33742.[10]

Article 2 nowhere requires a determination of the existence of blight. That determination was made earlier in the proceedings (Ordinance No. 2217, passed March 31, 1958, approving tentative plan).

We have pointed out elsewhere that at the time of the events under consideration there was no provision similar to present Health and Safety Code, section 33361 (former section 33730.5), requiring an opportunity to persons who deny the existence of blight to show cause why the final plan should not be adopted. From the adoption of section 33730.5, one may infer a legislative recognition that such right did not exist prior to the enactment of that section.

Appellant, therefore, was not prejudiced by any refusal of Council to take testimony intended to counter a finding of the existence of blight.

The type of evidence proposed to be elicited by Mr. Manuel from his witnesses by questions of the kind

intended to be given to Teodora G. Gallegos would not have been helpful in making the determinations required by sections 33731, 33733, 33734, 33736, 33737 or 33741 of the code. Conceivably the testimony of a displaced individual might bear upon the question as to what kind of housing he considered to be adequate for his particular needs, but such testimony would not determine the general availability of adequate housing for a large group. Appellant, in any event, would not be prejudiced by the lack of testimony of that type concerning the housing needs of persons other than herself.

We conclude that so far as appellant was concerned there was no denial of due process, or of the right to counsel, and there was no violation of the statutory requirements in the proceedings leading up to the passage of the ordinance approving and adopting the final plan.

Judgment affirmed.

Whelan, *J.*

We Concur:

Brown, *P. J.*

Coughlin, *J.*

Certified for Non-Publication, Rule 976.

Brown, *P. J.*

Coughlin, *J.*

Whelan, *J.*

Footnote 1:

Section 33006 defines a community as follows:

" 'Community' means a city or county."

Section 33040 declares:

"*Existence of blighted areas.* It is found and declared that there exist in many communities blighted areas which constitute either social or economic liabilities, or both, requiring redevelopment in the interest of the health, safety, and

general welfare of the people of such communities and of the State."

Section 33046 declares in part:

"(d) The remedying of such conditions may require the public acquisition at fair prices of adequate areas . . ."

Section 33047 declares in part:

"Declaration of state policy. For these reasons it is declared to be the policy of the State:

". . . .

"(c) That the redevelopment of blighted areas and the provision for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are governmental functions of state concern in the interest of health, safety, and welfare of the people of the State and of the communities in which the areas exist.

"(d) That the necessity in the public interest for the provisions of this part is declared to be a matter of legislative determination."

Section 33201 declares:

"Resolution of legislative body. An agency shall not transact any business or exercise any powers under this part unless, by resolution, the legislative body declares that there is need for an agency to function in the community."

Section 33203 declares:

"Dissolution of agency. If an agency has not redeveloped or acquired land for, or commenced the redevelopment of, a project, or entered into contracts for redevelopment within two years after the adoption of such a resolution, the legislative body may by resolution declare that there is no further need for the agency. Upon the adoption of the resolution the offices of the agency members are vacated and the capacity of the agency to transact business or exercise any powers is suspended until the legislative body adopts a resolution declaring the need for the agency to function."

Footnote 2:

Op. Cit. "When adjudicative facts are not in dispute, so that a trial type of hearing is not required, the most convenient procedure often is an oral argument, that is, a speech-making or public-meeting type of hearing. This type of hearing is very common for resolving non-factual issues of law or policy or discretion. Oral argument, after all, is the usual procedure before an appellate court. Experience both in courts and in agencies proves that both written briefs and oral arguments are usually desirable on important non-factual issues, as well as on most issues about legislative facts. In adjudications, both courts and agencies permit such arguments as a matter of course on all crucial issues and deny opportunity for oral arguments only when the issues

seem unimportant or when some special reason arises for dispensing with oral arguments. In administrative rule making, the oral argument is one of the major procedural methods." (p. 432, §7.07)

"A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." (p. 434, §7.07)

"Perhaps one of the most common deficiencies is the tendency to develop issues of policy as if they were issues of fact. The result is, as is often observed, that 'the witnesses argue, and the attorneys give evidence.' . . . Too few are the agencies which have caught the meaning of a simple but sound remark of a judge: 'Since the Commission had to decide primarily a question of policy and only incidentally a question of fact, the technique of a trial would have been clumsy and wasteful." (p. 578, §8.13)

Footnote 3:

"Is the system of rules of evidence, by law in force for trials by jury im the ordinary judiciary system, also legally applicable as such to inquiries of fact determinable by *administrative tribunals or officers?*

"The answer is, speaking generally, that the system is not applicable, either by historial precedent, or by sound practical policy; . . ." (1 Wigmore on Evidence (3rd Ed.) p. 25, §4a.)

Footnote 4:

In *Berggren v. Moore,* 61 Cal. 2d 347, 350-351, the court said:

> " 'Thus, it does not appear that the statute requires that at the public hearing held by the *agency* in the course of formulating and adotting a *proposed* redevelopment plan witnesses be sworn and made available for cross-examination. The absence of any reference to evidence and testimony' in the section (33700) dealing with the agency public hearing, and its express inclusion in the section 33730) directing that the *legislative body* at its own public hearing consider 'all evidence and testimony for or against' adoption of the plan, combine to indicate an awareness and intent by the Legislature that the agency's role in the formulation and adoption of a proposed plan for submission to the legislative body for final adoption or rejection may be carried out with a lesser degree of formality than that specified for the hearing before the legislative body. This view finds further support in the requirement of section 33730.5 that the notice of the latter hearing specifically state when and where those objecting to the plan, or denying the existence of blight or the regularity of prior proceedings, may present their showing.
>
> "The unchallenged finding of the trial court is that at the hearing before the council witnesses were sworn and plain-

tiffs were given the opportunity to cross-examine them. Plaintiffs make no complaint on this score, and the requirements of due process were obviously met."

Footnote 5:

"I have spoken to the only person that I know that fulfills those qualifications and she denies that she ever so indicated to any person. In fact, she is Charlotte Andrews, a plaintiff who has filed petitions seeking to restrain these matters."

Footnote 6:

At the public hearing on the adoption of the final plan, Mr. Manuel stated:

". . . for purposes of the record my name is Manuel Ruiz, Jr. My brother Alexander and I represent the Private Owners Mutual Redevelopment Association composed of property owners and occupants of homes which are located in the Meadowbrook Project Area. . . ."

He said further: "Most of the residents and occupants of the Meadowbrook Project Area as interested parties will testify"; and, again, "It is our intention to examine close to 50 witnesses—at length."

Mr. Manuel stated, "I am here representing clients whose names I will read into the record."

After naming the 73 proposed witnesses, Mr. Manuel said, "As counsel for these people I had requested them to take pictures of their homes; and in anticipation of the fact that the hearing with us representing these people . . ."

At another point, he said: "It is our intention to examine and inquire into original evidence concerning the present land uses by the present occupants of the project area; the number of old buildings that are well maintained, witness by witness and picture by picture; the facilities of each structure by original evidence, as may be testified to by its occupants who desire that you reject on the evidence to be presented; matters of ventilation, ingress, egress, light, vacant land, electricity, sewers, streets, population density, building density."

Footnote 7:

Section 33731 provides:

"On the question of the adoption of any redevelopment plan, the legislative body shall determine:

"(a) Whether the plan would redevelop the area in conformity with this part and in the interests of the public peace, health, safety, and welfare.

"(b) Whether the adoption and carrying out of the redevelopment plan is economically sound and feasible."

Section 33732 provides:

"If alternative plans are submitted, the legislative body shall give preference to the plan which it deems will best

redevelop the project area in conformity with the purpose and policy of this part and the master or general plan for the community and which requires the least interference with the continued enjoyment of existing property rights consistent with the purposes of this part."

Footnote 8:

Section 33706 provides as follows:

"Every redevelopment plan shall describe the proposed method of financing the redevelopment of the project area in sufficient detail so that the legislative body may determine the economic feasibility of the plan."

Footnote 9:

The city attorney stated: "I further advise the Council at this time that the witnesses which Mr. Ruiz wants to present by examination should be permitted to speak and should be told that they may come to the microphone and speak or testify as you wish and be heard by the Council."

Footnote 10:

Section 33742 provides:

"The approval of a redevelopment plan by a legislative body shall be by ordinance. The ordinance shall:

"(a) Contain a legal description of the boundaries of the project area covered by the redevelopment plan.

"(b) Set forth the purposes and intent of the legislative body with respect to the project area.

"(c) Refer specifically to the determinations required in other sections of this article.

[The determinations required are set forth in sections 33731, 33733, 33736, 33737, 33738, 33739 and 33741.]

"(d) Contain by reference to maps, reports, and other information the full details of the approved plan.

"(e) Designate the approved plan as the official redevelopment plan of the project area."

APPENDIX "C".

Petition for Hearing by the Supreme Court After Decision and Petition for Rehearing Before the District Court of Appeal, Fourth Appellate District.

In the Supreme Court of the State of California.

Charlotte Andrews, Petitioner and Appellant, vs. The City of San Bernardino, a Municipal Corporation, et al., Respondents. 4th Civil No. 7393.

Appeal From Superior Court of San Bernardino County, Hon. Herbert V. Walker, Judge.

OPINION BELOW

The opinion of the District Court of Appeal, Fourth Appellate District, is marked Exhibit "A", in the Appendix, and incorporated herein, by reference.

The Petition for Rehearing from the judgment and Opinion of said District Court of Appeal, is marked Exhibit "B", in the Appendix, and incorporated herein by reference.

INTRODUCTION

This is a representative suit brought by Charlotte Andrews on behalf of herself and other persons similarly situated, which numbered in excess of one-hundred and fifty (150) landowners in the affected area referred to in appellant's brief.

In essence this Appeal involves due process of law and the violation of the Fourteenth Amendment as it pertains to equal protection and the privileges and immunities of citizens of the United States. It likewise takes us into the more recently articulated field of what con-

stitutes a "vote" formerly relegated to the "political thicket" as non-justiciable. The District Court of Appeal failed and omitted to rule upon the Federal Constitutional issues raised by Appellant (see pages 4 to 6, Petition for Rehearing Exhibit "B", Appendix).

STATEMENT AND NATURE OF CASE

This case started back in the year 1950, which was fifteen years ago, when the Common Council of the City of San Bernardino at a regular meeting provided for a city-wide election wherein it submitted to the voters the following proposition:

> "Shall the Mayor and Common Council of the City of San Bernardino create and establish a redevelopment agency pursuant to the provisions of the California Community Development Act."

The voters of the City of San Bernardino voted, "NO". The election was certified pursuant to the Elections Code, became a binding ordinance of the City, and has never been repealed or amended by the voters of the City since that day. According to the City Charter, it could only be repealed or amended by the qualified voters of the City of San Bernardino, in the manner obtained, for its original passage. The creation of a Redevelopment Agency is concededly a legislative act and no party to this action has ever argued or contended to the contrary.

After the Common Council by Ordinance adopted the Redevelopment Plan, and in view of the position theretofore taken at the hearing thereon, that the proceedings were legislative and not quasi-judicial, the voters of the City of San Bernardino, determined to place the matter again before the community upon referendum.

The electors of the City of San Bernardino, circulated a referendary petition, after the City Council had adopted the final Redevelopment Plan, by Ordinance 2233. There is no contention that the referendary petition was insufficient. It was circulated by the voters because the Common Council was acting solely in a legislative capacity, and for said reason the Common Council was not bound to hear the evidence which was offered by the opponents to the plan.

After the referendary petition was completed and filed, the Common Council changed its position, and claimed that the adoption of the City Ordinance had not been legislative but instead had been an administrative act, and therefore was not subject to referendum.

With the above background of electors participation as citizen voters, the Court will note that when each isolated contention of error is considered by itself, in the series of events, which comprise the record of this case, although each isolated contention of error does not in itself seem to be of profound import; yet in considering the constitutional points raised against the state instrumentalities, it will be compelled to conclude that their cumulative effect shows a posture in State Public Policy, so stringent and unbending as to lead to a devastating overall result, which even the Justices of this Court, in reviewing the entire record, from beginning to end, will of necessity conclude that Federal Constitutional rights have been violated.

PRIOR HISTORY

In the year 1959, long before the record below was completed, and prior to the time of the trial of this pending action, or the entry of a final judgment from which an appeal could be taken, and during the initiatory

phases of certain action then being taken by the respondent City of San Bernardino, appellant sought a writ of Mandate and a Preliminary Injunction, which were disposed of by the Andrews case (infra).

THE CONSIDERATION OF THE APPELLATE COURT IN THE ANDREWS CASES WAS LIMITED TO PETITIONS WHICH ONLY INVOLVED PLEADINGS AND WHEREIN NO MENTION WAS MADE OF VIOLATIONS OF THE FEDERAL CONSTITUTION

Upon the denial by said Fourth District Court of said Writ for Mandate and Preliminary Injunction, referred to the Andrews cases, and respectively reported in 175 C.A. (2) 454, and 175 C.A. (2) 459, and after Petition for Hearing thereon was denied by the California Supreme Court, appellant took a Writ of Certiorari thereon to the United States Supreme Court, which court denied the same without an opinion.

Unfortunately, said Writ of Certiorari before the United States Supreme Court was presented prematurely, as a hearing had as yet not been had before the California State Superior Court, on the merits, as provided by State Law, and now before the State Courts in the instant proceeding for the first time.

THE FOURTH APPELLATE DISTRICT COURT COMMITTED ERROR IN THE CASE AT BAR IN HOLDING THE ANDREWS CASES RES ADJUDICATA ON MATTERS OF FEDERAL CONSTITUTIONAL LAW

The Andrews cases (supra) have been relied upon in the case at bar by the Fourth District Court of Appeal, to dispose of all of the United States Constitu-

tional issues raised by Appellant, upon the grounds that the same constitutes res adjudicata because Federal Constitutional points MIGHT HAVE BEEN PRESENTED IN SAID ANDREWS CASES, (see Exhibit "A", Appendix, page 9, lines 4 to 5).

Since the Federal Constitutional points (concededly) *were not* presented, failure by the Fourth District Court of Appeal to consider and rule, and instead to determine that Federal Constitutional issues and matters are foreclosed from further inquiry or consideration, constitutes error, and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

A full hearing has now been accorded in the Superior Court of the State of California, and all procedural matters pertaining to the same have now been permitted to become exhausted, upon the entire and completed record, excepting the matter at bar before the Supreme Court of the State of California, being the last Court of resort of said State.

As to the prior Andrews cases before this Court:

> "The doctrine of the law of the case is one of policy only, and will be disregarded when compelling circumstances call for redetermination of the point of law decided on prior appeals; particularly when new law has intervened or new precedent by controlling authorities."
>
> *People v. Lagiss*, 223 C.A. (2d) 25.

Federal Constitutional Law violations inclusive of lack of due process of law as defined by the Federal Courts in the hearings before the City Council was not

discussed nor considered by the Justices in the prior Andrews cases:

> "The right of suffrage may not be qualified because of some administrative benefit to the state. The 'fencing out' from the franchise of a sector of the population because of the way it may vote, is constitutionally impermissible. The political views of a particular group of bona fide residents, cannot be constitutionally obliterated. The case cited below, points out in the opinion of Justice Harlan, that it is the first case to hold that the *qualifications or disqualifications of voters are subject to the limitations of the Equal Protection Clause.*"
>
> *Carrington v. Rash,* 13 Lawyers Ed. (2d) 675 (March 1, 1965).

Neither the Andrews case (pending), nor the Carrington case (*supra*), refer to the cases which involve the abridgment of vote by reason of race, color or creed. Said type of abridgment is not involved in the case at bar either.

The United States Supreme Court has repeatedly stated that Federal rights cannot be violated under the name of local practice, even if it be of some administrative benefit to the local state legislative body.

Thus, there is no rational classification between one election or vote called an advisory vote or gallup poll vote or an election for fun, and another election called one which is binding or official, when the ballot itself upon which the elector votes does not make the elector aware of the same. Yet this arbitrary classification was imposed by the City of San Bernardino to nullify the vote of the electors who voted against the creation of the Redevelopment Agency. Our State Courts can-

not countenance and give sanction to deliberate attempts to mislead the electors. The classification is arbitrary. he right of suffrage may not be qualified because of some administrative benefit to the City Council, nor by a "sounding off device" to obliterate political views.

An examination of the two Andrews cases, reported in 175 C.A. (2d) 454, and 175 C.A. (2d) 459, will show that no mention was made in said Appellate Court opinions of "due process of law", "denial of equal protection of the laws", "abridgment of privileges and immunities". Neither the parties nor the 4th District Court pursued or considered any theory relating to the Constitution of the United States.

The electors of the City voted that a Redevelopment Agency shall not be created. The City Council nevertheless created such an Agency. The amendment to Section 33101 (1961) confirms prior doctrine that the creation of an Agency is legislative, and in recognition of the same the California Legislature has inserted the following:

> ". . . The ordinance of the legislative body declaring that there is need for an agency to function in the community shall be subject to referendum as prescribed by law for a county or a city ordinance."

THE REFERENDUM IS AN EXERCISE OF THE RIGHT OF SUFFRAGE AND A CONSTITUTIONALLY PROTECTED RIGHT WHICH REQUIRES EQUALITY OF PROTECTION.

The City of San Bernardino in Ordinance 2233, declared that the Redevelopment Plan for the Redevelopment of the area, was intended to meet the sound needs of the locality, as a whole. It stated that the plan would

require among other things, changes in zoning, the vacation and removal of streets, alleys, and other public ways, the establishment of new street patterns, the location and relocation of sewer and water mains and other public facilities, and other public action. In fact, it affected the entire tax structure of the city, as a whole. Gas Tax Projects of the City of San Bernardino, to construct a bridge, to widen Arrowhead Avenue, and change grades and alleys, and modifications of street layout in budgetary requests, to be made. In speaking of permanent displacement of occupants the city stated that "adequate permanent housing facilities are or will be made available within this city of such displaced occupants. . . ."

The new Ordinance did not just intend to zone a small area of the city to comply with a master plan which was in existence. A reading of the Ordinance shows that it symbolized a complete change in the organization of the land market. The general plan contained in the Ordinance had a direct effect upon all of the property and people in the city and upon its future. It was a frame work within which specific planning could be undertaken in the future, and to be the basis for the preparation of precise plans. It was the adoption in many respects of an entirely new policy. The plan was of permanent and general character. It was a declaration of a public purpose, under which circumstances no useful purpose would have been served by preventing the exercise of the democratic process, namely the permitting of a vote to be taken on the issue by the electorate of the city. To differentiate between a Comprehensive Zoning Plan and a Master Plan to Redevelop an entire community and permit a refer-

endary vote as to the first but deny it as to the latter, not only violates the equal protection clause of the United States Constitution, but nullifies the Federally protected "vote", and did so in the case at bar.

THE DISTRICT COURT DID NOT CONSIDER APPELLANTS EXCEPTIONS RELATING TO VIOLATION OF PROCEDURAL DUE PROCESS IN CONNECTION WITH PREPARATION FOR TRIAL IN MATTERS PERTAINING TO DISCOVERY

In case numbered 4th Civil 6858, before the California Supreme Court on Petition for Hearing after Decision without an opinion by the Fourth District Court of Appeal, appellant sought a Writ of Mandate as against the City of San Bernardino and the Redevelopment Agency, which sought by way of disclosure certain relevant and material facts, in preparation for trial purposes in the Superior Court. The Supreme Court denied the same without an opinion.

The opinion of the District Court, in the case at bar, at page 4, lines 3 to 7, states that it did not consider the above point because neither the order, nor the proposed interrogatories were made a part of the record.

Inasmuch, as said proceedings constitute one of the records in control of the Clerk of said Fourth District Court of Appeal, and reference to the same was made in oral argument, the same may have been inadvertent, and a request is hereby made of said Clerk, that the record which contains the order and the interrogatories be made a part of this petition, so that the same be reviewed in light of appellants attack on appeal (See, Chap. XVII, page 123 et. seq. Vol. II, Appellants Opening Brief).

A state Municipal Corporation functioning as an arm of the State in a matter of a State concern, to effectuate a State legislative objective, cannot qualify a local Redevelopment Agency for the purpose of its becoming the recipient of federal funds to develop said City, under color of a State enabling community redevelopment act, by the refusal to count votes cast against the creation of a Redevelopment Agency which after its creation becomes self-perpetuating and is not responsible to the electors, is in violation of the Fourteenth Amendment.

The expressed vitriolic prejudice against allowing petitioners to be represented by counsel who represented many persons who could not express themselves in English, appears in the Reporter's Transcript of the hearing wherein one of the City Councilmen of the Municipal Corporation, with the apparent approval of the other Councilmen, stated that appellants attorneys were "carpetbaggers from Los Angeles."

The Urban Renewal Law, which provides capital grants and monies to authorized local public agencies, permits states to pass enabling legislation, to take advantage of federal assistance. One of the limitations is:

> (1). "No land for any project to be assisted under this subchapter shall be acquired by the local agency except after public hearing following notice of the date, time, place, and purpose of such hearing."
>
> Par. 1455, Ch. 42, Title 42, U.S.C.A. p. 542.

The above Federal Law constitutes an affirmative prohibition, and direct limitation, upon states or their local municipal delegatees, and refers to a hearing which must be a meaningful hearing.

It is contended by petitioner that both the State and Federal Constitutions have been abridged by the Municipal Corporation, i.e., Council of the City of San Bernardino, in violating procedural due process in having denied property owners of a meaningful hearing.

In the case of Home Tel. & Tel. Co., v. the City of Los Angeles, reported at 227 U.S. 278, a California corporation sued the City and certain of its officials to prevent the putting into effect of a city ordinance for lack of due process. The court refused to grant a restraining order or allow a preliminary injunction.

The case involved the proposition that state officers which abused powers lawfully conferred upon them did so in contravention of the due process clause of the State and the Federal Constitutions.

The Supreme Court of the United States laid down the rule of decision, that the provisions of the Fourteenth Amendment were generic in terms, and addressed not only to the States, but to every person, whether natural or judicial, who is the repository of state power. That the Federal judicial power may redress the wrong done by a state officer misusing the authority of the State with which he is clothed; under such circumstances inquiry whether the State has authorized the wrong is irrelevant.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

(1) United States Constitution, Amendment XIV, Sec. 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where-

in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) Proposition "A" as submitted and voted upon by the electors at general election held on November 7, 1950, City of San Bernardino, California, on the creation of a local Redevelopment Agency, and certification that the greater number of voters cast thereon were against the creation and establishment of Redevelopment Agency. (See Exhibit 4 in evidence, Clerk's Transcript and action 92797, pages 4 to 9 inclusive.)

(3) Resolution No. 2361, adopted June 23, 1952, by the Common Council of the City of San Bernardino, California, which created and activated a local Redevelopment Agency. (Exhibit 4 in evidence, at page 8; see also Exhibit 6.)

(4) Ordinance No. 2217, adopted on March 31, 1958, by the Common Council of the City of San Bernardino, California, which approved the adoption of a Tentative Redevelopment Plan (Text appears in Exhibit 4 in evidence, page 23, subpages 8-32; see also Exhibit 38.)

(5) Ordinance No. 2233, adopted July 21, 1958, by the Common Council of the City of San Bernardino, which approved the adoption of a Final Redevelopment Plan. (Exhibit 48 in evidence.)

(6) Certification of sufficiency of referendum by electors by Clerk of the Appellee Municipal Corporation

on Ordinance No. 2233. Admitted as true by respondents for purposes of general demurrer and sustained without leave to amend by order of Respondent Superior Court on December 3, 1958, Hon. Edward P. Fogg presiding, and designated in the Petition for Judicial Review on file with the Respondent Court below as a second and separately stated cause of action, and designated in said Judicial Review as Plaintiff's Exhibit I and appended thereto. (See also Exhibit 5.)

(7) Article VII, The Initiative, City Charter, City of San Bernardino . . . Section 127 (b):

> "The ballots used when voting upon said proposed Ordinance shall contain the words 'For the Ordinance,' (stating the general nature of the proposed Ordinance) and 'Against the Ordinance,' (stating the general nature of the proposed Ordinance). If a majority of the qualified electors voting on said proposed Ordinance shall vote in favor thereof, such Ordinance shall thereupon become a valid and binding Ordinance of the City; and any Ordinance proposed by petition, *or which shall be adopted* BY A VOTE OF THE PEOPLE CANNOT BE REPEALED OR AMENDED EXCEPT BY A VOTE OF THE PEOPLE OBTAINED IN LIKE MANNER." (Supplemental Clerk's Transcript, p. 40.)

CONCLUSION

In attacking the validity of the Municipal Resolutions and Ordinances of the Common Council of the City of San Bernardino which established the Redevelopment Agency and adopted and approved the redevelopment plans hereinafter referred to, it is respect-

fully submitted that while the Supreme Court may not control the discretion legally vested in the Common Council of the City of San Bernardino, it may under the record submitted hereunder do the following:

(1) Order the Common Council and its Agency, the Redevelopment Agency of the City of San Bernardino, to take such further action as may be specifically enjoined upon them, or either of them, by law, and declare their proceedings contrary to law and invalid, and for that purpose order that there be set aside the Resolutions and Ordinances hereinafter referred to.

(2) Determine whether the Redevelopment Agency was in fact legally created and established by Municipal fiat, in contravention of the electors' privileges and immunities as United States Citizens who cast votes against the creation and establishment of said Agency, and which Common Council rendered ineffective said votes cast.

(3) Determine whether the refusal of the Common Council of the City of San Bernardino to act upon a referendary submission to the voters of the City of San Bernardino, which was certified by the Clerk as sufficient, abridged the privileges and immunities and deprived the opponents to Redevelopment of the equal protection of the law and due process of law.

(4) Order the Common Council to proceed with referendary action by the voters of the City of San Bernardino.

Respectfully submitted,

Manuel Ruiz, Jr., and
Alexander Ruiz,
Attorneys for Petitioner

Petition for Rehearing.

In the District Court of Appeal, Fourth Appellate District, State of California.

Charlotte Andrews, Petitioner and Appellant, vs. The City of San Bernardino, a Municipal Corporation, et al., Respondents. 4th Civil No. 7393.

Appellant files herewith her petition for rehearing from the judgment and opinion of the above Court of Appeal, filed July 25, 1965.

The grounds upon which said petition for rehearing is asked, are as follows:

I.

Material facts were omitted from or incorrectly stated in the opinion of the Court.

II.

Substantial legal issues raised in Appellant's briefs were not considered by the Court, leaving unsettled important questions of Federal Constitutional Law.

I

MATERIAL FACTS WERE OMITTED FROM OR INCORRECTLY STATED IN THE OPINION OF THE COURT.

A. Reference is made to page 3, lines 16 to 21 of said Opinion, wherein the following is incorrectly stated as having been a contention of Appellant:

"She does this on the claim that the creation of Agency without a popular vote . . . denied her the right to vote, and the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States."

To the contrary, the contention of the Appellant of and concerning the creation of the Redevelopment Agency by respondent City Council by Resolution adopted June 23, 1952, which was an admittedly legislative act, is as follows:

> That a popular vote was in fact taken by the electors of the City to the effect that the City Council *not create* and establish the Redevelopment Agency, after which said Council in violation of its City Charter, and contrary to said expressed election, nevertheless did create said Agency.
>
> That no force or affect was therefore given to a vote already so cast by the electors, which denied their right to said vote so cast, and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

B. Reference is made to page 4, lines 3 to 7, of said Opinion ,wherein the following is incorrectly stated, to-wit:

> "In her brief, she returns to attack upon the order sustaining objections to interrogatories as being violative of her right to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. However, neither the order nor the proposed interrogatories have been made a part of the record on appeal."

To the contrary, Appellant made reference to case 4th Civil No. 6695, wherein:

> The District Court must take judicial notice of its own records, of which it has control, and the subject matter thereof. Said opinion in fact refers

to its own file in its opinion and identified its case by the number of its files, (pg. 3, lines 27-32), wherein said interrogatories were propounded and set forth in the briefs, and wherein the orders of said District Court appear in full. Reference to said record was again made by Appellant at the time of the hearing on oral argument.

II

SUBSTANTIAL LEGAL ISSUES RAISED IN APPELLANT'S BRIEFS WERE NOT CONSIDERED BY THE COURT, LEAVING UNSETTLED IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW.

The District Court of Appeal did not rule upon the Federal Constitutional issues raised in said Appellant's briefs, incorporated herein by reference upon the FULL RECORD FOR JUDICIAL REVIEW which is now before the said Court for the first time.

Reference by the District Court in its opinion that State Court prior decisions may be correct as to matters of state law decided therein and cannot be relitigated, (pg. 6 lines 15-17), is a truism which does not apply, however to questions of state powers vs. the Federal Constitution.

When the Andrews cases, which the Appellate Court took judicial notice of, and cited as 175 C.A. (2) 454, and 175 C.A. (2) 459, were called to the attention by Petition for Writ of Certiorari to the Supreme Court of the United States, Respondents herein correctly contended before said Court, that the presentation of Federal constitutional issues was premature, in that Appellants had not as yet sought a judicial review before

the California Courts upon the entire and full record now before the Fourth District Court of Appeal, and said Federal Constitutional issues had not been presented to the Courts below. The Petition by Appellant for certiorari was accordingly denied without a hearing or decision, and the important questions of Federal Constitutional Law remain unsettled.

The Andrews cases referred to by said District Court of Appeal (infra), were never affirmed by either the California Supreme Court or the United States Supreme Court, and the Fourth District Court of Appeal, in citing said cases as res-judicata, has cited itself as its own binding authority on matters of Federal Constitutional Law which said Court of Appeal alleges *might have been presented in said Andrews cases.* (Page 9, lines 4-5.)

Said Court now has the clear option and duty to consider and rule upon each violation of the Federal Constitution referred to in Appellant's briefs, made a part hereby by reference. Failure by the Fourth District Court of Appeal to so consider and rule, and instead to conclude that Federal issues and matters are foreclosed from further inquiry or consideration by reason of res-judicata, constitutes error, and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully,

Ruiz and Ruiz,
by Manuel Ruiz